IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 62/2003.

Shri Ditendra C. Kerkar,
C/o Shri Chandrakant Kerkar,
Durgabhat, Ponda, Goa. ... Petitioner.

VERSUS

1. Shri Peter Araujo,
   Near Haveli Sankow,
   Opp. Ozin Cloth Stores,
   Haveli, Curti,Ponda, Goa.

2. State. ... Respondents.
   (Through Public Prosecutor).

Mr. V.A. Lawande, Advocate for the Petitioner.

Respondent No.1 absent.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No.2.

CORAM: P.V. HARDAS, J.

DATE: 11TH MARCH, 2004.

ORAL JUDGMENT:

The applicant/original accused, assails the Judgment of the Sessions Judge, Panaji, dated 12th November, 2003, in Criminal Appeal No.83/2002, dismissing the appeal filed by the applicant and confirming the conviction and sentence under Section 138 of the Negotiable Instruments Act 1881 and sentence of simple imprisonment for one month and payment of compensation of Rs.1,20,000, in default S.I. for thirty days, passed by the Judicial Magistrate First Class, Ponda,by Judgment dated 8th November, 2002 in Criminal Case No.20/OA/02/D.

2. The facts giving rise to this petition, can be briefly stated hereunder.

The respondent no.1/original complainant filed a complaint under Section 138 of the Negotiable Instruments Act, against the applicant/accused. The said complaint, which was filed on 28.1.02, was registered as Criminal Case No.20/OA/02/D. The allegations in the complaint were that the applicant/accused had issued Cheque bearing No.026735 dated 27.12.01 for Rs.1,00,000 drawn on the Bicholim Urban Cooperative Bank Ltd., Ponda towards the payment of the amount payable by the accused. On presentation of the said cheque for realisation, the same was returned back by the complainant's banker along with a memo of the Bicholim Urban Cooperative Bank Ltd. on the ground of "insufficiency of funds". The complainant issued a notice to the accused dated 1.1.02, calling upon the accused to pay the aforesaid amount of Rs.1,00,000/-. The accused sent a reply dated 10.1.2002 disclaiming any liability to pay to the complainant the said amount. Accordingly the aforesaid complaint came to be filed.

The learned Trial Judge issued process against the accused and the substance of acquisition came to be explained to the accused vide Exh.5. The accused

denied his guilt and claimed to be tried. The complainant examined himself as P.W.1. The complainant stated that he was working as Driver on the tanker belonging to the accused during the period 1995 - 1996. As the accused was in need of money in connection with the business, the accused had requested the complainant to lend him Rs.1,00,000/-. P.W.1 further states that initially he gave a sum of Rs.50,000/- out of his savings to the accused and thereafter paid him Rs.50,000/- by instalments. On demanding the refund of the money, the accused issued a cheque dated 27.12.2001 drawn on the Bicholim Cooperative Bank. P.W.1 further states that on presentation of the said cheque, the said cheque was returned back "Unpaid due to insufficiency of funds". The said cheque is at Exh.Pw1/A Colly. Thereafter a notice came to be issued which is at Exh.Pw1/A Colly. The reply of the accused to the notice is at Exh.Pw1/C Colly.

In the cross-examination on behalf of the accused, the complainant states that the writing on the cheque is not his. Initially he stated as not true that the handwriting on the cheque is not of the accused. But later on stated that he did not know. He further states that the accused gave him the cheque on the way at Ponda on 27.12.2001. It was at about

9.15 a.m. One Ramdas Naik was present when the cheque was handed over to him. He was unable to state as to when the accused had visited his house last for assuring the payment. He also could not state the number of times the accused had visited his house till the issue of the cheque. The complainant then states that the amount of Rs.50,000/- was paid in cash in the month of January, 1999. He states that this amount was in his hand. Remaining Rs.50,000/- was paid to the accused in instalments. He further states that the last payment was done in November, 1999. He states that during the payment of the first Rs.50,000/- Ramdas Naik was present. He further states that he had voluntarily left the services as he wanted to do some business. He states that he had purchased a jeep in the year 2000. He has also admitted that sometimes he used to work for Ramnath Naik. He has also admitted that after leaving the job with the accused and till today he had worked for Ramnath Naik. He denied the suggestion that his services were terminated on account of stealing of petrol and diesel. He then states that he paid the last instalment to the accused in the month of October. He then stated that the amount of Rs.50,000/- which he had paid was recorded in his account book which he could produce. He states that the amount of Rs.50,000/- was paid to the accused near

Vithoba Temple. On production of the pass-book which is at Exh.PW1/D the complainant stated that he had withdrawn Rs.40,000/- from his Bank and he had Rs.10,000/- cash with him and this was paid to the accused. He then states that he had paid Rs.5000/- on 6th February, 1999, Rs.10,000/- on 8th March, 1999 and Rs.7000/- on 17th March, 1999, Rs.5000/- on 3rd June, 1999, Rs.11,500/- on 29th September, 1999, Rs.1500/- in October, 1999 and thereafter he had paid Rs.10,000/-. He also admitted that he does not recollect the place where he had paid Rs.5000/- to the accused on 6.2.1999. He says that he had given this money when he met the accused in the town casually. He states that the accused used to come and meet him and there was no fixed place for meeting, but the accused was knowing where the complainant was. He states that he had paid the amount on different occasions. He further states that when he had paid the money he was not in the service of the accused. He denied the suggestions that the entries of the withdrawal recorded in the pass-book do not pertain to the payments to the accused. He also denied the suggestion that the accused had given him blank cheque when in employment for the use of petrol, diesel, etc.

3. The complainant examined Ramdas Naik as P.W.2. Ramdas Naik states that in January, 1999 the

complainant had give a parcel to the accused of Rs.50,000/-. On the second occasion the accused had given a cheque to the complainant. He states that the cheque was handed over to the at the Post Office of Ponda in his presence. In the cross-examination he has admitted that he owns one tanker, while the accused was having 3 to 4 tankers. He as admitted that his relations with the accused are not cordial. He states that he had not opened the parcel which was given by him. He states that he had gone to the market and in the market he had met the complainant who had asked him to accompany him. Thereafter they went to Vithoba Temple at which place he had given the parcel to the accused. Thereafter he asked the complainant as to what he had given the accused and the complainant told him that he had paid Rs.50,000/- to the accused. He states that the accused was on his scooter and on seeing them, he had stopped the scooter. He further states that at the time of giving the cheque he was present. The accused had handed over the cheque to the complainant. He has stated that the cheque was handed over at the Ponda Post Office. He states that he had employed the complainant on his tanker at that time due to friendship.

4. The accused examined himself as a witness and

has stated that the complainant was working as Driver on Tanker bearing No.GDZ-7790. He states that he had dismissed the complainant as he noticed shortages and the complainant was creating trouble. The shortages were in respect of petrol, diesel, etc. When the complainant was employed by him, at that time he had 5 tankers. He has denied that he had issued Cheque for Rs.1,00,000/- payable to the complainant. He has stated that a cheque book containing this cheque was obtained by him in the year 1998 and had exhausted the entire cheque book in the same year. Whenever a Driver used to go outside the State, he used to give a blank cheque in order to meet emergent situations. The instant cheque had been similarly handed over to the complainant. This cheque had been given to the complainant in June, 1998, while the complainant was in his employment. He has produced the pass-book at Exh.DW1/A which shows that all the cheques had been encashed. When he removed the complainant he did not take this cheque back from the complainant. He had forgotten to take the cheque. He has further stated that the body writing of the cheque is not in his handwriting. After dismissal of the complainant he had never met the complainant. He has denied that he had borrowed money from the complainant. In the cross-examination he has stated that after dismissing complainant from service, he had not demanded or sent

any legal notice to the complainant calling upon the complainant to hand over the cheque. There is no effective cross-examination of the accused. He has only been given suggestions in the cross-examination which have been denied by him.

5. The learned appellate court while dismissing the appeal, has held that P.W.1 Peter Araujo and P.W.2 Ramdas Naik were subjected to cross-examination, but without positive results in favour of the accused. The learned appellate court therefore concluded that there were no grounds to disbelieve the evidence of P.Ws.1 and 2. In respect of the defence of the applicant/accused, the learned appellate court observed that the accused had admitted having issued the cheque to the complainant when the complainant was working with him in order to meet emergency expenses. The learned appellate court has further held that the accused had failed to substantiate this plea taken by him and held that on the basis of the evidence on record, it was not possible to believe the stand taken by the accused.

6. It is true that in a revision under Section 397 of the Code of Criminal Procedure, this Court does not appreciate the evidence and come to a different conclusion than the conclusion recorded by the two

courts below unless the reasoning of the two courts below is completely perverse warranting interference. Merely because the two courts below had concurrently recorded a finding, this Court in its revisional jurisdiction is not prohibited from reappreciating the evidence. In the present case the appellate court being the last court of fact, has not dealt with the facts and the evidence and therefore I am constrained to reappreciate the evidence.

7. The evidence of the complainant at the very threshold that the accused who was the owner of 5 tankers, was in need of money and had approached the complainant, requesting for a loan is doubtful. Curiously, according to the complainant the payment of this hand loan to the accused was spread over nearly a year. According to him the first instalment was paid in January, 1999, while the last instalment was paid somewhere in October or November, 1999. The notice issued by the complainant at Exh.PW1/A Colly is extremely vague. This aspect of the accused's request for a loan appears to be subsequently thought out plan by the complainant to justify the issuance of the cheque by the accused. The complainant states that Rs.50,000/- had been paid in cash and according to him an amount of Rs.40,000/- appears to have been withdrawn by him from the Bank. Though the statement

in that behalf is not clear, however the inference is that he had withdrawn Rs.40,000/- from the Bank and Rs.10,000/- which he had in cash he had paid the accused Rs.50,000/-. The relevant portion of the evidence is reproduced herein:- " I am producing my pass book. I say that Rs.40,000/- is written on my pass-book and Rs.10,000/- I paid him cash ". This obviously was not his assertion in the examination-in-chief. In the examination-in-chief it was restricted only to the payment of Rs.50,000/- in cash as first instalment. Even in the earlier part of the cross-examination he states that he had Rs.50,000/- " in my hand " and the remaining Rs.50,000/- was paid to the accused in instalments. He states that the last payment was done in November, 1999. Later on production of the pass-book he states that Rs.40,000/- had been withdrawn from the Bank and along with Rs.10,000/- he had in cash he paid the accused Rs.50,000/-. The payment on the various other dates stated by him in the cross-examination have been stated in order to synchronise with the dates of withdrawal of various money on those dates from his account. In the examination-in-chief he has not stated the dates on which the balance of Rs.50,000/- was paid in instalments. Thereafter in the cross-examination he was unable to state at which place the balance of Rs.50,000/- was paid. He was

unable to state when last the accused had visited his house. He had not stated about payment of Rs.50,000/- in the presence of one Ramdas Naik in the examination-in-chief, but stated so only in the cross-examination. The said Ramdas Naik was also not cited as a witness in the list of witnesses. The complaint itself is blissfully vague as it does not state about the accused borrowing Rs. 1 lakh from the complainant and issuing a cheque for the repayment of the said amount. The pass book onperusal does not evidence any withdrawal of Rs.40,000/- on the stated date.

8. It is true that the presumption under Section 139 is available. However the presumption can be rebutted by relying on the admissions of the complainant and his witnesses in the cross-examination as well as on the basis of the evidence of the accused. The appellate court has however not dealt with the presumption and the rebuttal of evidence. According to me, the story of the complainant itself tasks human credulity for its acceptance that the accused who was a one time employer of the complainant would request for a loan of Rs.1 lakh from the complainant who at one time was his employee. The evidence of the complainant is far from satisfactory and he has exposed himself very badly as he has

improved on his case in the cross-examination in stages.

9. P.W.2 has been examined to corroborate the complainant. Apart from the fact that P.W.2 was not on cordial terms with the accused, P.W.2 refers to the complainant giving a parcel and P.W.2 then asking the complainant as to what was contained in the parcel and more importantly he speaks about the accused issuing the cheque for Rs.1 lakh near the Post Office at Ponda. P.W.2's statement that he had gone to the market and had met the complainant and the complainant had asked him to accompany him when the first instalment of Rs.50,000/- was tendered to the accused appears to be extreme doubtful. Neither the complainant nor P.W.2 have advanced any reason as to why the complainant sought the presence of P.W.2 while handing over Rs.50,000/- to the accused. The complainant has stated that he had not obtained anything in writing from the accused for the payment. If that be so, there would be no earthly reason for the complainant to ask P.W.2 to accompany him.

10. The learned Trial Court has dismissed the defence of the accused on three grounds, the first ground being that the accused in his reply to the notice of the complainant had stated that the

complainant was a driver working on Tanker bearing No.GDZ-7792. This, according to the learned Trial Court, is contrary to the number which is stated by the accused in his evidence. The accused has stated that the complainant was a driver of Tanker bearing No.GDZ-7790. The second ground on which the defence of the accused is disbelieved, is that according to the accused the cheque was handed over to the complainant to meet emergency expenses, whereas what is stated in the reply of the accused is that the cheque in question was entrusted to the complainant to hand over to the petrol pump from whom the accused used to obtain fuel. There is hardly any material contradiction as the accused had stated in his evidence that blank cheques used to be issued in order to meet emergency expenses. The recitals in the reply are to the extent to meet the petrol expenses. The third reason is that in the reply the complainant is referred to as an honest employee while the accused has labelled him as an dishonest employee. The accused in the reply had referred to the complainant not as an honest employee, but what is stated in the reply is "however, my client never thought of any foul play on the part of your client as he always considered him as an honest employee". And the last reason for disbelieving the evidence is that the accused had never initiated any steps like reporting

the matter to the police or sending notice to the complainant for recovery of the cheque. Admittedly the accused had stated that he had forgotten that a blank cheque was in the possession of the complainant when the complainant was dismissed from service. If that be the case, not issuing a notice or filing a complaint is hardly material. The evidence of an accused particularly led in rebuttal of a presumption cannot be discarded by such fanciful reasons. While appreciating the evidence of a witness, the Court must also take into consideration if, at the close of the evidence, that is after the cross-examination is complete, whether the witness emerges as a truthful witness. Though it is true that the Courts need not accept the testimony of a witness which, on the basis of it, is inherently improbable, merely because there was no cross-examination, but at the same time, the courts must be conscious, as in this case, that there is hardly any cross-examination to affect the veracity of the accused. On the contrary, the cross-examination of the complainant and his witness reveal the various gaping holes in the complainant's case and it is difficult to accept the complainant's case. According to me therefore, the evidence of the accused coupled with the admission of the complainant in the cross-examination, rebuts the presumption available to the complainant under Section 139 of the

Negotiable Instruments Act.

11. The respondent No.1/complainant, though served, has chosen not to put an appearance. He has also not engaged any Advocate to represent him in this Revision. After giving my anxious consideration to the evidence on record, I find that the judgments of both the courts below are perverse and unsustainable. There is no material whatsoever to warrant the conviction of the applicant/accused. The Judgments of the Courts below therefore deserve to be quashed and set aside.

12. In the result, Criminal Revision Application is allowed. The Judgments of the two courts below are hereby quashed and set aside and the Applicant is acquitted of the offences for which he has been convicted. Bail Bond stands cancelled.

P.V. HARDAS, J.

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